

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 655 OF 2003

1. Shri Madhavrao Maruti Bhapkar,
 2. Sou. Sushila Madhav Bhapkar,
 3. Shri Sandeep Madhav Bhapkar,
 4. Sou. Vijaya Milind Patole,
 5. Sou Alka Vijay Pole,
 6. Sou. Asha Anil Pilane,
 7. Sou. Smita Anil Bhosale,,
 8. Sou Anjali Uday Punde,
 9. Sou.Pratibha Bhagwanrao
Bhargude.
- ... Appellants.

V/s.

1. Leelabai Shankarrao Bhapkar,
 2. Shri Sachin Shankarrao Bhapkar,
 3. Deepali Shankarrao Bhapkar,
 4. Shri Jatin Shankarrao Bhapkar,
 5. Sou. Smita Bharat Jadhav,
 6. Sou. Vaishali Shankarrao
Bhapkar.
- ... Respondents.

Shri Mohan Pungaliya for the Appellants.

Shri R.G.Ketkar for Respondent Nos.1 to 5.

Shri R.A.More for Respondent No.6.

CORAM: A.S. Oka, J.

DATE : 24th January, 2005.

ORAL JUDGMENT:

. The Appellants have taken exception to the impugned judgment and order dated 11th July, 2003 passed by learned trial Judge by which an application for temporary injunction at Exh.5 made by the Respondent Nos.1 to 5 has been allowed. By the impugned order of temporary injunction, the Appellants have been restrained from obstructing the common possession of Respondent Nos.1 to 5/ plaintiffs over the suit properties described in paragraphs 1(a) and 1(b) of the plaint and also from obstructing Respondent Nos.1 to 5 from common enjoyment thereof. They are also restrained from demolishing the structure standing upon the suit property and from developing the suit property. They have been also restrained from creating third party interest in respect of suit property.

2. The Respondent Nos.1 to 5 filed suit against the Appellants and the Respondent No.6, inter alia, for a declaration that the sale-deed dated 24th October, 2002 executed by the Appellant Nos.1 to 8 in favour of the Appellant No.9 in respect of suit property described in paragraph 1(b) of the plaint is illegal. A prayer is also made for a direction

to the Appellant Nos.1 to 8 to execute the sale-deed in respect of their share, right, title and interest in the suit property described in paragraph 1(a) of the plaint in favour of the of Respondent Nos.1 to 5 for consideration of Rs.10 lakh. The case of the Respondent Nos.1 to 5 is that the Respondent Nos.1 is widow of late Shankarrao Maruti Bhapkar who expired on 20th February, 1992. Respondent Nos.2 to 6 are the sons and daughters of late Shankarrao. The case of the Respondent Nos.1 to 5 in the suit is that deceased Shankarrao and the Appellant No.1 jointly purchased the suit property described in paragraph 1(a) of the plaint by a registered sale-deed from one Shri Baburao Narayanrao Sanas and late Shankarrao and the Appellant No.1 are having equal shares in the suit property described in paragraph 1(a) of the plaint. The further case in the plaint is that late Shankarrao and the Appellant No.1 had constructed a house jointly on the suit property and deceased Shankarrao had 1/2 undivided share in the said structure. The Respondents No.1 to 6 are the legal representatives of deceased Shankarrao and have inherited 1/2 share of deceased Shankarrao in the suit property. A further case is made out in the plaint that the Respondents and the Appellant Nos.1 to 8 are in joint possession and enjoyment of the suit property.

3. The Appellant No.1 had filed Regular Civil Suit No.694 of 1996 against the Respondents herein for declaration and injunction. In the said suit the contention of the Appellant No.1 was that in January 1984 there was a partition effected between deceased Shankarrao and the Appellant No.1 in respect of the suit property described in paragraph 1(a) of the plaint. A portion consisting of four rooms on ground floor and one room on first floor was allotted to the share of the Appellant No.1. The said suit was resisted by the Respondent Nos.1 to 5 and said suit was dismissed on merits by rejecting theory of partition propounded by the Appellant No.1. It is stated in the plaint that the Appellant No.1 has preferred appeal for challenging the judgment and decree passed in the said suit and the said appeal is pending.

4. The Appellant Nos.1 to 8 purported to execute a sale-deed dated 24th October, 2002 in respect of a specific portion of the suit property more particularly described in paragraph 1(b) of the plaint in favour of the Appellant No.9 for total consideration of Rs.10 lakh. The challenge in the suit is to the said sale-deed on various grounds. One of the main grounds is that the suit property as described in paragraph 1(a) of the plaint is not partitioned by metes and bound and, therefore, the

Appellant Nos.1 to 8 had no authority to execute sale-deed in respect of specific portion of the suit property. It is submitted that the Appellant Nos.1 to 8 and the Respondents are co-owners of the suit property and, therefore, the Appellant Nos.1 to 8 ought to have offered their share in the suit property to the Respondents. It is contended that as the Appellant Nos.1 to 8 were not in possession of any specific portion of the suit property, a sale-deed in respect of any specific portion of the suit property could not have been executed by the Appellant Nos.1 to 8.

5. The Respondent Nos.1 to 5 made an application for temporary injunction praying for following:

(a) During the pendency of the present suit the Defendants No.1 to 9 may kindly be restrained by an order of temporary injunction, from dealing with the suit properties described in para 1(a) and 1(b) and also from creating third party interest and entering into any transaction or agreement in respect of the suit properties described in para 1(a) and 1(b) on the basis of the said sale deed dated 24/10/2002 or otherwise, in any manner whatsoever either personally or through their agents, servants, assigns etc.

(b) During the pendency of the present suit the Defendants No.1 to 9 may kindly be restrained by an order of temporary injunction, from obstructing the common possession of the plaintiffs over the suit properties described in para 1(a) and 1(b)

of the plaint and also from obstructing the plaintiffs from common enjoyment thereof, in any manner whatsoever either personally or through their agents, servants, assigns etc.

(c) During the pendency of the present suit the Defendants No.1 to 9 may kindly be restrained by an order of temporary injunction, from demolishing the structure or any part thereof standing on the suit properties described in para 1(a) and 1(b) of the plaint and also from developing and putting construction on the suit properties described in para 1(a) and 1(b) of the plaint, either personally or through their agents, servants, assigns etc.

6. The Application for temporary injunction was contested by the Appellant No.9 by filing a detailed reply. The Appellant No.9 admitted that the suit plot on which structure is standing was jointly purchased by the Appellant No.1 and late Shankarrao. However, it is contended that entire amount of consideration was paid by the Appellant No.1 and at the instance of the father of deceased Shankarrao his name was inserted in the sale-deed. According to the Appellant No.9, as late Shankarrao was trying to claim share in the suit property, at the intervention of their mother, the Appellant No.1 gave two rooms on the front side of the northern half of the property and a garage to late Shankarrao. It is the case of the Appellant No.1 that third room on the rear side in the northern portion of the house was used as a place for dining and storage, and cooking was done in the garage. It

is the contention of the Appellant No.9 that after demise of Shri Shankarrao, the user of said portions of the property by the Respondent Nos.1 to 5 was continued by the Appellant No.1. A specific case is made out that the Respondents have no right in the property. The Appellant No.9 claimed to be in possession of the suit property described in paragraph 1(b) of the plaint.

7. A separate reply was filed by the Appellant Nos.1 to 3. In the said reply various contentions raised by the Respondent Nos.1 to 5 were denied.

8. Learned trial Judge held that prima facie case has been established by the Respondent Nos.1 to 5 and, therefore, learned Judge proceeded to grant temporary injunction.

9. Shri Pungalia, learned counsel appearing for the Appellants stated that the judgment and decree passed in Regular Civil Suit No.684 of 1996 has not attained finality and an appeal preferred against the said judgment by the Appellant No.1 is pending in the District Court. Learned counsel relied upon the report of the Court Commissioner submitted in the District Court in the said pending Appeal. Relying upon the said report, learned counsel submitted that the Appellant No.1 was in separate

possession of the property described in the sale-deed and, accordingly, the sale-deed has been executed in favour of the Appellant No.9 and the Appellant No.9 is in possession of the said property. He submitted that in the face of the report of the Court Commissioner, learned Trial Judge could not have come to the conclusion that the Respondents were in joint possession of the suit property described in the plaint and could have granted temporary injunction on that basis. He submitted that the findings recorded by the trial Court in the said suit filed by the Appellant No.1 cannot be relied upon as the said findings are not final as an appeal is pending in the District Court. He submitted that even according to the Respondent Nos.1 to 5/ original plaintiffs deceased Shankarrao had 1/2 share in the suit property and, therefore, the Appellant No.1 had right to execute conveyance in respect of other half. He submitted that in any event Commissioner's report shows the separate enjoyment by the parties of different portions of the suit property and, therefore, possession of the parties as per the Commissioner's report should not be disturbed. Shri Pungaliya relied upon the judgment of Allahabad High Court in **Ram Bilas v.**

Shiv Rani, AIR 1977 All 437.

10. Shri Ketkar, learned counsel appearing for the Respondent Nos.1 to 5 submitted that in earlier suit filed by the Appellant No.1 he has failed to prove theory of partition propounded by him and, therefore, he has failed to prove that he was in exclusive possession of four rooms on the ground floor and one room on the first floor. He submitted that no interim relief has been granted in favour of the Appellant No.1 in the pending civil appeal in the District Court. He submitted that so long as the judgment and decree stands, the Appellant No.1 can claim to be only a co-owner of the property and, therefore, he could not have put the Appellant No.9 in possession of any specific portion of the suit property described in paragraph 1(a) of the plaint.

11. Mr.More, learned counsel appearing for the Respondent No.6 has supported the Respondent Nos.1 to 5.

12. I have carefully considered the rival submissions and I have perused relevant documents on record of the appeal from order. It is not in dispute that in the appeal preferred by the Appellant No.1 against the judgment and decree passed in Regular Civil Suit No.684/1996, no interim relief is granted in favour of the Appellant No.1. It is also not in dispute that in the said suit the

case made out by the Appellant No.1 is that there was a partition by metes and bounds of the suit property and certain specific portion of the suit property was allotted to him and he has been in exclusive possession of the said portion. Learned trial Judge framed following issue as issue No.1:

"Does the plaintiff prove that by virtue of the partition deed effected in January 1984 the four rooms in ground floor allotted to him and he is exclusive owner of the property mentioned in para 1A of the plaint?"

The said issue was decided against the Appellant No.1. While dismissing the suit, learned Judge not only disbelieved the case of partition but also disbelieved the case made out by the Appellant No.1 that there was a private arrangement between the parties in respect of enjoyment of different portions of the suit property. In paragraph No.15 of the judgment learned Judge held thus:

"..... But there is no documentary evidence on record to show that private arrangement took place in between the parties as asserted by the plaintiff in his pleadings. A private partition between the co sharers means not only separate arrangement for separate enjoyment of specific portion of the property but also division of rent and taxes and entries to the city survey extract to that effect. In the present suit no documentary evidence is on record to show that a private partition took place in between parties and as per the partition the plaintiff is in possession of 4 rooms on the ground floor and one room on the first floor. In view of above discussion issue No.1 is answered in the negative."

13. It is true that an appeal against the said judgment and decree is pending in the District Court. In absence of any interim relief granted in the said appeal in favour of the Appellant No.1 it is impossible to accept at this stage that the Appellant No.1 was in exclusive possession of any specific portion of the suit property described in paragraph 1(a) of the plaint. Acceptance of contention of learned counsel for the Appellants that the Appellant No.1 was in exclusive possession of certain portion of the suit property will amount to passing an order which is inconsistent with the final judgment in the earlier suit between the same parties. Therefore, learned trial Judge recorded prima facie finding disbelieving the case of the Appellants regarding partition. Learned Judge also noted that in the sale-deed executed in favour of the Appellant No.9 there was a recital which refers to the earlier suit filed by the Appellant No.1. It is, thus, apparent that the Appellant No.9 has purchased the property with the knowledge of the earlier suit.

14. In so far as the report of the Court Commissioner is concerned, it is for the Appellate Court to consider the same in the pending Appeal. However, the report, prima facie, does not prove the factum of partition alleged by the Appellant No.1.

Therefore, in my view, reliance placed by learned counsel for the Appellants on Commissioner's report will not help the Appellants in this appeal. Learned trial Judge has recorded a finding that the Appellant No.9 could not have been put in possession of any specific portion of the suit property. It is not in dispute that the property was jointly purchased by late Shankarrao and the Appellant No.1. As the position stands today, it is impossible to accept the contention of learned counsel for the Appellants that there was a partition between deceased Shankarrao and the Appellant No.1 or that there was an arrangement under which both the parties agreed to enjoy separate portions of the property.

15. The order passed by learned trial Judge is a discretionary order. In an appeal preferred against the discretionary order, no interference is called for unless it is shown that discretion exercised by the trial Court was arbitrary. On the face of the decision of the Civil Court in the earlier suit, it is not possible to accept that the discretion has been arbitrarily exercised. The suit is pending for final hearing and till the final disposal of the suit the order of temporary injunction deserves to be granted in favour of the Respondent Nos.1 to 5. The ratio of the judgment of the Allahabad High

Court cannot have application to the facts of this case and, especially, when the earlier suit filed by the Appellant No.1 is dismissed on merits.

16. Hence there is no merit in the appeal and the same is dismissed with no order as to costs.

17. It is obvious that the findings recorded by learned trial Judge as well as by this Court are only tentative findings for limited purpose or considering the prayer for interim relief. The pending suit and pending civil appeal will be decided by the concerned courts on its own merits. Liberty to the parties to apply for expeditious hearing of the suit.

18. All the concerned to act on an authenticated copy of this judgment.
